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6 **IN THE UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 LAURA LEIGH,

9 Plaintiff,

10 **Case No. 3:10-cv-00417-LRH-VPC**

11 vs.

12 KEN SALAZAR, in his official capacity as  
Secretary of the U.S. DEPARTMENT OF  
THE INTERIOR, BOB ABBEY, in his official  
13 capacity as Director of the BUREAU OF  
LAND MANAGEMENT; RON WENKER in his  
14 official capacity as Nevada State Director of  
the BUREAU OF LAND MANAGEMENT, et  
15 al.,

16 Defendants.  
17 \_\_\_\_\_/

18 **PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER**

19 Plaintiff LAURA LEIGH seeks a temporary restraining order precluding  
20 Defendants from the harmful conduct described herein below.

21 This Motion is made in accordance with Fed.R.Civ.P. 65(b). The Motion is  
22 based on the pleadings and papers on file herein, the accompanying Memorandum of  
23 Points and Authorities and supporting documents and on such other matters as may be  
24 presented before the court.

25 Dated this \_\_\_\_ day of July 2010

26 RESPECTFULLY SUBMITTED,  
LAW OFFICE OF GORDON M. COWAN

27  
28 \_\_\_\_\_  
Gordon M. Cowan Esq. (SBN 1781)  
Attorney for Plaintiff LAURA LEIGH

1                   **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF**  
2                   **MOTION FOR TEMPORARY RESTRAINING ORDER**

3                   Plaintiff LAURA LEIGH submits the following Memorandum of Points &  
4 Authorities in support of her Motion for a Temporary Restraining Order:

5                   **BACKGROUND**

6                   Plaintiff challenges the final decision of the Bureau of Land Management ("BLM")  
7 to drive wild horses by helicopter, during foaling season, from public lands in Elko  
8 County. BLM calls this helicopter push the "Tuscarora Gather" ("Gather" or "BLM  
9 helicopter Gather"). The BLM helicopter Gather would violate the BLM's own  
10 management standards. The BLM would engage in a prohibited act as is defined in the  
11 BLM's own publications. The BLM's Gather, scheduled during the foaling period, would  
12 place in harm's way a protected public resource. The BLM's Gather would contravene  
13 U.S. public policy respecting wild horses. The BLM's Notice of Closure is at **EXHIBIT**  
14 **"A"** attached.

15                  Plaintiff also challenges the BLM's decision to exclude the public, the press,  
16 journalists or anyone not involved in the Gather, from entering 27,000 acres of public  
17 lands where the Gather would occur. The BLM even closed air space there to exclude  
18 observation of the Gather by use of aircraft. This broad closure and exclusion of those  
19 interested in observing and reporting the BLM's management of public lands, as  
20 practiced, censors fair observation and reporting of the Gather by the press, by  
21 journalists and by Plaintiff (also a journalist and writer) of newsworthy matters involving  
22 government action on public lands which is of significant public interest. This broad  
23 closure and exclusion of the public and press by the BLM results in an impermissible  
24 prior restraint of free speech and censoring of the press, of journalists and of the public  
25 prohibited by the First Amendment of our Constitution.

26                  ///

27                  ///

28                  ///

## BLM's POOR CHOICES

The BLM's intended course is just plain wrong, it is harmful and it causes irreparable harm. Some reasons why the BLM's conduct is wrong and harmful are as follows:

### The Horses and Foaling Season

1. The BLM's helicopter Gather runs wild horses off public lands during the recognized foaling period;
2. The BLM's helicopter Gather would likely
  - a. harm, maim or kill unweaned foals,
  - b. harm, maim or kill mares (moms) who recently gave birth,
  - c. harm, maim or kill soon-to-be birthing mares who are in their final stage of pregnancy;
3. The BLM's helicopter Gather is prohibited *at this time* by its own published standards expressed in its official management manual, the *Wild Horses and Burros Management Handbook* ("BLM Wild Horse Management Handbook" or "BLM Handbook"). The BLM Handbook was recently published June 2010. The BLM Handbook prohibits the BLM from gathering or removing horses by helicopter during the foaling period. The BLM Handbook says this:

#### **4.4.4 Foaling Period**

[T]he ***capture of wild horses by using a helicopter to herd the animals is prohibited during the foaling period, which is defined as six weeks on either side of the peak of foaling to assure that young foals are mature enough to be able to remain with their band during gather activities. This period is generally March 1 to June 30 for most wild horse herds . . . .***

**EXHIBIT “B”** attached. (Emphasis added).

4. Just days before the BLM closed off the helicopter Gather area, observers saw first hand, the following in the Gather area:

- a. Several newly born foals;
- b. Several unweaned foals;
- c. Several mares who just recently gave birth and who were nursing newly born foals;
- d. Several pregnant mares appearing late in their final stage of pregnancy and appear ready to foal any day.

The observers' attached Affidavits provide more detail of such horses observed, the date(s) and locations where these young horses and mares were seen. The observers are available to tell the court what they saw before the BLM closed off the Gather area;

5. One observer is a wildlife ecologist who has considerable experience in studying and working with wild horses and other species in range habitats. The biologist confirms the health, safety and welfare of the young foals, the mares who recently gave birth and the pregnant mares who are about to foal, would be jeopardized from the BLM's intended helicopter Gather. He confirms the general foaling period is in the range of dates from approximately March to mid-August. The wildlife ecologist confirms the helicopter Gather is premature and within the actual foaling period. The biologist confirms helicopter driving of wild horses who are in this fragile state (i.e. being newly born or having recently given birth, or coming to the end of a pregnancy), would have a difficult time surviving the BLM's helicopter Gather. (See discussion, below);

6. The BLM's Gather is contrary to the stated public policy of the United States relative to the management of wild horses on federal lands. The public policy is stated in The Wild Free-Roaming Horses and Burro Act of

1971 which provides, in relevant part, as follows:

Congress finds and declares that wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene. It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands.

The Wild Free-Roaming Horses and Burro Act of 1971,  
P.L.92-195, 16 U.S.C. 1331.

7. The BLM remains stubbornly steadfast to proceed with its helicopter Gather, just for “plan’s sake,” in spite of the likely resulting tragic consequences of placing in harm’s way newly born foals, unweaned foals, mares who recently gave birth and mares approaching the end of their pregnancies;
8. The BLM’s choice to conduct a helicopter Gather while disregarding true conditions of mares and babies in the BLM’s intended helicopter Gather area, and while disregarding its own standards relative to the foaling period, is arbitrary, capricious, it amounts to an abuse of discretion, it is otherwise not in accordance with law, or it is implemented without observance of procedure required by law.

///

///

1           *Censure of Journalists and Fair Reporting – a Constitutional Infringement*

2           9.       The closure of the area from the public including journalists, the press and  
3                   citizens, amounts to a prior restraint on observation and fair reporting of a  
4                   newsworthy event having significant public interest;

5           10.      The closure effectively censors from the public and from the viewer's eye,  
6                   information that is of significant public interest concerning the  
7                   government's management of public resources.

8       **LEGAL STANDARDS**

9       **A. Standard of Review Under APA**

10           Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*,  
11           "[a]gency action made reviewable by statute and final agency action for which there is  
12           no other adequate remedy in a court are subject to judicial review." *Id.* § 704.

13           The APA provides that the reviewing court *shall* "hold unlawful and set aside  
14           agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or  
15           limitations, or short of statutory right." *Id.* § 706(2)( c).

16           "To determine if the Secretary has exceeded his statutory authority under 5  
17           U.S.C. § 706(2)( c), the Court must engage in the two-step inquiry required by  
18           *Chevron.*" *Anna Jacques Hosp. v. Leavitt*, 537 F. Supp. 2d 24, 29-30 (D.D.C. 2008)  
19           [referring to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837  
20           (1984)].

21           "If the intent of Congress is clear, that is the end of the matter; for the court, as  
22           well as the agency, must give effect to the unambiguously expressed intent of  
23           Congress." *Chevron*, 467 U.S. at 842-43. "[I]f the statute is silent or ambiguous with  
24           respect to the specific issue, the question for the court is whether the agency's answer  
25           is based on a permissible construction of the statute." *Id.* at 843.

26           Applying *Chevron* and the APA, we look to the Wild Free-Roaming Horses and  
27           Burro Act of 1971. See, P.L.92-195, 16 U.S.C. 1331 *et. seq.* (The "Wild Horse Act" or  
28           the "Act").

1  
2 **B. The Wild Horse Act**

3 It is the public policy of the United States of America to protect and preserve  
4 wild-free roaming horses. Congress states this policy as follows:

5 Congress finds and declares that wild free-roaming horses  
6 and burros are living symbols of the historic and pioneer  
7 spirit of the West; that they contribute to the diversity of life  
8 forms within the Nation and enrich the lives of the American  
9 people; and that these horses and burros are fast  
10 disappearing from the American scene. *It is the policy of*  
11 *Congress that wild free-roaming horses and burros shall be*  
12 *protected from capture, branding, harassment, or death; and*  
13 *to accomplish this they are to be considered in the area*  
14 *where presently found, as an integral part of the natural*  
15 *system of the public lands.*

16 The Wild Free-Roaming Horses and Burro Act of 1971,  
17 16 U.S.C. §1331 (Emphasis Added).

18 Congress defines the powers and duties of the Secretary of the Interior, relative  
19 to the management of wild horses on public lands, in Section 1333 of the Act. That  
20 Section defines by mandatory language the Secretary's obligation to *humanely* capture  
21 certain wild horses. Section 1333 provides in relevant part, that the removal of excess  
22 horses from public lands,,

23 [s]hall be taken, in the following order and priority until all  
24 excess animals have been removed so as to restore a  
25 thriving natural ecological balance to the range, and protect  
26 the range from the deterioration associated with  
27 overpopulation:

28 (A) The Secretary shall order old, sick, or lame animals to

1 be destroyed in the most humane manner possible;

2 (B) ***The Secretary shall cause such number of***  
3 ***additional excess wild free-roaming horses and***  
4 ***burros to be humanely captured*** and removed for  
5 private maintenance and care for which he  
6 determines an adoption demand exists by qualified  
7 individuals, and for which he determines he can  
8 assure humane treatment and care (including proper  
9 transportation, feeding, and handling) . . . .

10 16 USC 1333 (b)(2)(iv)(B) (Emphasis Added).

11 The *humane* capture language repeats in mandatory terms.

12 The *specific issue* here is *not* whether the BLM may proceed with a gather of  
13 wild horses. The issue instead, is whether the BLM may proceed with its helicopter  
14 Gather when utilizing a method and timing that is *inhumane* to the animals it seeks to  
15 capture.

16 If the BLM's method of capture is determined or considered *inhumane*, in that  
17 event the BLM's conduct would appear to be contrary to Congress' expressed intent  
18 when it mandated,

19 The Secretary *shall* cause such number of  
20 additional excess wild free-roaming horses . . .  
21 to be *humanely* captured . . . .

22 16 USC §1333 (b)(2)(iv)(B) (Emphasis Added).

23 The BLM's method if inhumane, would also be contrary to Congress' expressed, stated  
24 public policy that,

25 wild free-roaming horses and burros shall be  
26 protected from capture, branding, harassment,  
27 or death; and to accomplish this they are to be  
28 considered in the area where presently found,



as an integral part of the natural system of the  
public lands.

16 USC §1331.

Should the court agree there is a sufficient basis to conclude the method and timing of the gather is contrary to express provisions of Congress, then the court, “must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43.

**C. Plaintiff’s Contentions re. The Wild Horse Act**

*Timing of the Helicopter Gather*

Plaintiff contends the BLM’s helicopter Gather as *timed*, together with the employment of driving herds five to ten miles via helicopter, is inhumane to young foals, to mares who recently gave birth, and to those mares who approach the end of their pregnancy. *These* particular horses are not those considered, “old, sick, or lame animals,” although they become sick and lame when they are not mature enough to be driven by the rotor blades of a chopper the distance of several miles in the heat of the Nevada desert. (Today’s expected “high” temperature in Elko should reach 96°).

If the BLM concludes that “sick or lame” horses include those who are too young to travel, or those who are not in condition because they recently gave birth, or those who can’t stand the trip because they are carrying a foal and are close to terminating their pregnancy, then Messrs. Salazar, Abbey and Wenker should consider taking lessons in compassion and humanity. Should BLM disregard foals because they don’t recognize them until after they are identified, accounted-for or freeze-branded, in that event the Agency’s philosophy and self-imposed rules are ineffective and contrary to clear Congressional intent.

Mr. Craig Downer, a wildlife ecologist who maintains impeccable credentials, concludes this:

11. It is not humane in my opinion, to drive by  
helicopter, foals from the Gather area at this time, when in a

1 fragile state because of their young age. This is because  
2 they have soft hoofs and are not able to withstand the sharp  
3 rocks from a long drive. They also have developing lungs,  
4 muscles and bones and do not have the stamina to run  
5 those long distances as do more mature horses. The  
6 mares who recently gave birth are in a fragile state and  
7 likewise at risk of injury.

8 \* \* \*

9 13. In my experience and from personal  
10 observation which spans many years now, it is my opinion  
11 that, due to the extreme heat of the midsummer and the  
12 jagged lava outcroppings found in these particular wild horse  
13 herd management areas (Little Humboldt, Rock Creek and  
14 Owyhee which comprises the area of the Tuscarora Wild  
15 Horse Gather) and the tender age of many young, it would  
16 be cruel to these horses in the difficult rocky conditions and  
17 high daily temperatures for the BLM to continue with the  
18 above mentioned "Tuscarora" helicopter Gather.

19 Mr. Downer's Declaration is included as a separate document in support of this Motion;  
20 and his credentials are stated therein. ("Craig Downer's Declaration"). Plaintiff  
21 incorporates this Declaration herein.

22 The Foaling Period

23 Plaintiff contends the BLM's decision to conduct its helicopter Gather during the  
24 relevant foaling period is likewise inhumane. The BLM's decision also contravenes its  
25 own published rules on gathering these horses.

26 The Actual Foaling Period

27 There is sufficient evidence demonstrating the relevant foaling period continues  
28 at least to mid-August. The evidence includes the following:

1. Young foals and mares who recently gave birth were seen in the area of the BLM's helicopter Gather just before the area was closed down by the BLM. Laura Leigh's Declaration, filed in support of this Motion, confirms the following:

I was in this very Tuscarora Gather area three days the end of May, this year. At that time I personally observed the following: I saw not many horses or signs of horses. I did see at a minimum, 20 horses comprised of three different bands. One was a bachelor band. The other two bands contained mares and babies. Within these two family bands, I saw three mares obviously pregnant. I saw two foals in one band and one in the other band. The foals I saw were less than 30 days old. The pregnant mares I saw appeared to be close enough to be within six to eight weeks of giving birth.

Laura Leigh's Declaration, p. 3

Plaintiff incorporates her Declaration herein.

2. Mr. Craig Downer's Declaration states as follows:

7. On Monday, June 21st, 2010, I overflew the Little Humboldt, Rock Creek and Owyhee wild horse herd management areas. These areas are now referenced by the Bureau of Land Management ("BLM") collectively as the Tuscarora Wild Horse Gather area. On this date I observed at least 312 wild horses in 41

1 different bands. I also observed roughly ten  
2 times more grazing cattle than wild horses.

3 8. During this flight I personally observed  
4 many pregnant wild mares or mares who had  
5 recently given birth together with newborn foals  
6 at their sides. I saw many more of these  
7 mare/foal pairs in the Rock Creek and Owyhee  
8 BLM herd management areas than were  
9 observed elsewhere.

10 Craig Downer's Declaration, pp.2-3.

11 Mr. Downer also observes this:

12 In my experience and from personal  
13 observation which spans many years now, it is  
14 my opinion that the typical foaling period for  
15 wild horses in this area and in other wild horse,  
16 public lands management areas generally  
17 spans from early March to mid-August. And,  
18 the intended Tuscarora Wild Horse Gather  
19 would occur in the natural and normal foaling  
20 period for these horses.

21 Craig Downer's Declaration, pp.3-4.

22 *The BLM's Published Foaling Period*

23 As stated previously, the BLM's own management manual (outlined above),  
24 defines the foaling period as including the six weeks following June 30<sup>th</sup>; that the peak  
25 foaling period ends June 30 and the foaling period extends six weeks beyond June 30.  
26 See, **EXHIBIT "B"** attached.

27 The BLM is content to play semantics at the expense of these protected animals.  
28 They claim the wording of the BLM's document is "unfortunate" but that it really means

1 something else.

2 Conclusion re APA

3 Without belaboring the point further, there is sufficient evidence that would lead  
4 reasonable persons to conclude the clear, expressed intent of Congress is denigrated  
5 and violated by the BLM's choice to conduct a helicopter Gather during the *actual*  
6 foaling season of the Tuscarora wild horse gather area. The BLM's conduct ignores not  
7 only the actual foaling season, it disregards the typical foaling season, and it disregards  
8 its own published "foaling period" so as to conduct a "prohibited" helicopter gather in the  
9 area. The BLM's stubbornness in refusing to delay its Gather by about four weeks to  
10 avoid the foaling period causes an *inhumane* gather, contrary to the clear, express  
11 intent of Congress. Such stubbornness in action should be sufficient to "hold unlawful  
12 and set aside agency action . . . found to be . . . in excess of statutory jurisdiction,  
13 authority, or limitations, or short of statutory right." *Id.* § 706(2)( c).

14 **THE CONSTITUTIONAL CHALLENGE**

15 Does the closure of public lands by the BLM during its helicopter Gather violate  
16 the First Amendment? Does the First Amendment include certain unarticulated rights  
17 which protects from censoring or closure, the public, the press, journalists and writers,  
18 from first-hand viewing, listening, observing and obtaining newsworthy information of  
19 the BLM's helicopter Gather occurring on public lands? Does the BLM's sordid history  
20 in having maimed and killed horses in past gathers, make the matter more  
21 newsworthy?

22 The First Amendment to the United States Constitution provides that "Congress  
23 shall make no law...abridging the freedom...of the press."

24 After a series of mistrials in a Virginia murder case a State trial judge closed all  
25 court proceedings to the media and to the public. Two reporters and the local  
26 newspaper were ousted from the courtroom. The Richmond Newspaper brought suit  
27 challenging the judge's closure of the public forum. The newspaper's writs were  
28 dismissed by the Virginia Supreme Court. The issue went from there to the U.S.

1 Supreme Court.

2 In a 7-to-1 decision the Court held that the right of access by the press and  
3 public to criminal trials is "implicit in the guarantees of the First Amendment." The Court  
4 held the First Amendment encompassed not only the right to speak but also the  
5 freedom to listen and to receive information and ideas. The Court also noted the First  
6 Amendment guarantees the right of assembly in public places such as courthouses.  
7 The Court emphasized that "certain unarticulated rights" were implicit in enumerated  
8 guarantees and were often "indispensable to the enjoyment of rights explicitly defined."  
9 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980).

10 *Richmond Newspaper's* ideology of openness and publicity in criminal trials is no  
11 less instructive or germane here. The area of the BLM helicopter Gather occurs on  
12 public lands to which the public has a right to be. The BLM's "management" of, "living  
13 symbols of the historic and pioneer spirit of the West" is an issue of significant public  
14 interest. The press, journalists and writers who observe, listen and then report to the  
15 public what transpires, is newsworthy. The BLM does not have a stellar record in prior  
16 gathers where they have in the past, caused multiple casualties of young foals and  
17 other wild horses when using the same method they plan to use in the BLM helicopter  
18 Gather.

19 To restrict and close off the BLM helicopter Gather area from the press, from  
20 journalists, from writers and from the public, is an impermissible limitation to rights  
21 enumerated under the First Amendment to the U.S. Constitution.

22 To close off 27,000 acres of public lands and its airspace without advising well in  
23 advance where, when and how the press, journalists, writers and the public might able  
24 to view the BLM helicopter Gather, is an impermissible limitation to rights enumerated  
25 under the First Amendment to the U.S. Constitution.

26 To limit the press, journalists, writers and the public access to viewing and  
27 observing the actual BLM helicopter Gather itself, which by restrictive rules on distance  
28 or through other vague, limiting methods, which effectively shields or censors from the

1 public's view the BLM's actual herding, driving, moving and capture of wild horses from  
2 public lands, is likewise an impermissible limitation to rights enumerated under the First  
3 Amendment to the U.S. Constitution.

4 The BLM is *not* able to state it maintains a stellar record in preventing injuries  
5 and deaths among the wild horses they've herded and gathered previously. This fact  
6 makes the BLM helicopter Gather of even greater newsworthy importance to the public  
7 interest.

8 The press must have the freedom to observe and then report newsworthy  
9 matters including and without limitation, abuses of power by governing authorities,  
10 cover-ups of unofficial government action, or the like. The citizenry should be made  
11 aware of matters involving public interest. There should be a free exchange of both  
12 information and opinion *sans* government hindrance, between the press and the public  
13 who are interested recipients of these reports. Even if the news is critical of  
14 government action, the First Amendment protects from government interference, the  
15 free exchange of that information, of ideas and of opinions.

16 Just like the court proceedings in the Virginia murder trial discussed in *Richmond*  
17 *Newspaper*, the BLM's helicopter Gather may not be a "front page," national event.  
18 Nevertheless, the BLM's methodology in managing, herding, moving and capturing wild  
19 horses from public lands via helicopter is a newsworthy matter. It should be open to  
20 public scrutiny particularly where the closure involves public lands, on which the public  
21 routinely has access.

22 Broadly closing the Gather area and then not specifically defining well in  
23 advance of the event, areas, times, locals from which the press, journalists and the  
24 public may view the BLM's helicopter Gather, amounts to an impermissible prior  
25 restraint on the ability of the press, of journalists, of writers and of the public to view and  
26 document government in action. The plan is in practice, a form of censorship.

27 Whether the Defendants must convince the court that a compelling or substantial  
28 government interest is involved, or if the Defendants must merely meet a "balancing

test,” neither test is satisfied under these facts.

## **THE PLAINTIFF**

Plaintiff Laura Leigh receives revenues from fair reporting to the public as a journalist on issues involving wild horses and also their management by both private organizations and by governing authorities including the BLM. Her participation has included magazine, internet and television including CNN.

Ms. Leigh has on several occasions, been to the areas where the BLM helicopter Gather is to take place. She has also observed and reported on other BLM gathers of wild horses from public lands.

Ms. Leigh is also a regarded, talented publisher, artist and illustrator of art. Her more recent works involve horses as her subjects. She is also involved in publishing children’s books. She has completed art projects for significant charitable organizations including by example, the United Way. Samples of her work are available on the internet at [www.barndoorstudio.com](http://www.barndoorstudio.com).

Ms. Leigh is also the person in charge on behalf of the Cloud Foundation, of the “Herd Watch” Program. Information concerning the Cloud Foundation is obtained on the internet at [www.thecloudfoundation.org](http://www.thecloudfoundation.org). The purpose underlying the “Herd Watch” program is as follows:

[t]o create a concise database of information that tracks public lands range health, gather operations and the disposition of American wild equids. The database will be utilized as a tool to educate and inform the public to provide accurate responses in the public process of democratic government.

## **FED.R.CIV.P. 65**

Fed.R.Civ.P. Rule 65 is self-explanatory and for brevity, is not repeated herein. There are certain requirements the court must determine before agreeing to issue injunctive relief. These topics are addressed as follows:



1 **STANDING**

2 Under these facts together with her supporting Declaration, Ms. Leigh has  
3 “standing” to bring this claim. At least one other federal trial judge, the Hon. Rosemary  
4 M. Collyer of the District of Colombia found such “standing” on much less supportive  
5 facts than those provided herein. See, e.g., *Colorado Wild Horse and Burro Coalition,*  
6 *Inc. v. Salazar*, 639 F. Supp. 2d 87 (2009)(held, plaintiffs had standing to challenge  
7 plan and BLM lacked inherent authority to remove horses under the Wild Horse Act).  
8 Ms. Leigh’s Declaration establishes requisite standing.  
9

10 **NO ADEQUATE OR SPEEDY REMEDY AT LAW**

11 Plaintiff as a journalist maintains no adequate or speedy remedy at law in being  
12 precluded from the area of the BLM helicopter Gather. No action for damages is  
13 sufficient; nor would it be timely. No other relief appears prudent except that in equity  
14 which allows for injunctive relief.

15 Plaintiff as a writer and illustrator of children’s books addressing management  
16 methods of wild horses, maintains no adequate or speedy remedy at law when the  
17 BLM’s helicopter Gather alters the children story line from a good story involving good  
18 and responsible management practices of wild horses on free ranges. Plaintiff has no  
19 desire to illustrate what would likely amount to a grim epitaph of the demise of young  
20 foals and mares who recently gave birth, and of pregnant mares, resultant of herding  
21 wild horses from public lands during their foaling period. Children, always looking for a  
22 good ending to a story, are not likely to appreciate such a dreary, dark aftermath.

23 Plaintiff has no adequate or speedy remedy at law when her Constitutional  
24 freedoms are limited by government action. The closure of the BLM helicopter Gather  
25 limits her ability as a journalist to visualize, observe and then report what transpires in  
26 an event that has public interest and is newsworthy.

27 **IRREPARABLE HARM**

28 Where there is a prior restraint on speech or on the freedom to report

1 government activity, there is always irreparable harm. How does one place a price on  
2 an infringement – even just a little infringement – on one’s freedoms caused by  
3 improper or illegal interference from government?

4 Ms Leigh would suffer immediate, irreparable harm and injury from being denied  
5 the opportunity to engage in her vocations. She is denied access to see, to hear, to  
6 view and to report a government agency in action that maintains a history of injuring  
7 and maiming or killing the very resource and specie it’s charged with protecting. This is  
8 newsworthy material, the BLM knows it and they seek to hide it by simply closing the  
9 area.

10 When Ms. Leigh and those similarly situated are effectively censored from  
11 providing fair reporting of government in action, she and others similarly situated incur  
12 irreparable harm. By the government’s closure, Ms. Leigh and others become limited  
13 from engaging in the very freedoms the First Amendment guarantees that it would  
14 protect. Her free speech is stymied. The public’s right to know, and Ms. Leigh’s ability  
15 to report, how the BLM conducts its Gather, becomes effectively censored when the  
16 BLM excludes all from the BLM helicopter Gather area.

17 Plaintiff refers the court to her supporting Declaration which outlines other  
18 irreparable harm to her.

### 19 **SUBSTANTIAL LIKELIHOOD OF PREVAILING ON MERITS OF SUIT**

20 Ms. Leigh maintains a substantial likelihood of prevailing on the merits. She in  
21 essence seeks claims for Declaratory Relief and for Injunctive Relief. She contends the  
22 BLM is not operating with authority under their own guidelines; and she has expert  
23 testimony to support the claims. But, more important is, she’s right!

24 Ms. Leigh’s injunctive relief on constitutional grounds is well-founded. The BLM  
25 remains secretive on exactly, where, when and how they would allow visitors to the  
26 area to view the Gather. By closing off 27,000 acres including the air space above and  
27 then leaving it to the last minute with vague instructions on where to find postings of  
28 visitor areas, the BLM excludes the public, journalists, the press and Ms. Leigh from

1 observing and reporting government in action on a hot topic. This is an impermissible  
2 stifling of speech. It limits the ability of the press to report on newsworthy matters  
3 involving substantial public interest.

## 4 **TWO FINAL REASONS WHY A TRO IS APPROPRIATE**

### 5 *Publication in the Federal Register*

6 The BLM is required to publish its temporary closure order of public lands for the  
7 Tuscarora Gather, in the Federal Register. As of this immediate past weekend, no  
8 such publication was found by the undersigned. If for some reason the temporary  
9 closure order was *timely* filed in the Federal Register, in that event the undersigned did  
10 not find it, apologizes for raising the issue, and would appreciate being given a copy of  
11 same.

12 Meanwhile, the failure to publish the closure order as required, would cause the  
13 prevention of those seeking to view and observe the Gather, illegal and contrary to  
14 relevant, existing law.

### 15 *The Gather in Progress*

16 The undersigned is informed and believes that as a result of today's activities by  
17 the BLM in the BLM helicopter Gather, that they have thus far, killed seven (7) horses.  
18 No more is known at this point.

## 19 **NOTICE TO THE GOVERNMENT**

20 As of this writing the court has yet to issue a Summons for service. However,  
21 copies of the filed Complaint and of this Motion were sent electronically to Erik  
22 Peterson, Esq., with the U.S. Dept. of Justice in Washington D.C.

23 Attorney Peterson asks that the following be conveyed to the court:

24 Counsel for the Plaintiff has informed counsel for the  
25 Federal Defendants that Plaintiff intends to seek a TRO in  
26 this matter, and the Federal Defendants stated that they  
27 intend to file a responsive brief and wish to be heard on this  
28 matter before the Court issues a ruling.

1 **CONCLUSION**

2 The undersigned conveyed to Trial Attorney Peterson, that the Plaintiff would  
3 “stop the press” and *not* file suit if the Defendants agreed to postpone the gather to  
4 mid-August. This “olive branch” was refused, forcing suit and this motion to be filed.

5 For reasons discussed Plaintiff respectfully requests a Temporary Restraining  
6 Order issue precluding the BLM’s intended, described conduct of the Tuscarora Gather,  
7 until such time as the court schedules a hearing on a preliminary injunction, based on  
8 the preliminary finding that the Tuscarora Wild Horse Gather is in, “excess of statutory  
9 jurisdiction, authority or limitations, or short of statutory right.” 5 USC §706(2)( C).

10 **COUNSEL CERTIFICATION**

11 In accordance with Fed.R.Civ.P., as counsel for Plaintiff, the undersigned hereby  
12 certifies he personally spoke with Defendants’ counsel Mr. Petersen, that this Motion  
13 would be sought shortly; that the undersigned provided Defendants’ counsel Mr.  
14 Petersen a courtesy copy of the Complaint before the weekend; and the undersigned  
15 provided by electronic service, a copy of this Motion to Mr. Petersen.

16 Dated this 12<sup>th</sup> day of July 2010

17 RESPECTFULLY SUBMITTED,  
18 LAW OFFICE OF GORDON M. COWAN

19 /S/

20 \_\_\_\_\_  
21 Gordon M. Cowan Esq. (SBN 1781)  
22 Attorney for Plaintiff LAURA LEIGH  
23  
24  
25  
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28

**CERTIFICATE OF SERVICE**

[Pursuant to Fed. R. Civ. P. 5(b); LR 5-1; Section IV of District of Nevada Electronic Filing Procedures]

I certify that I am employed at 1495 Ridgeview Drive, #90, Reno, Nevada, 89519; and, on this date I served the foregoing document(s) on all parties to this action by:

X Electronic service:

Erik Petersen, Esq. [erik.peterson@usdoj.gov](mailto:erik.peterson@usdoj.gov)

\_\_\_\_\_ Placing an original or true copy thereof in a sealed envelope with postage prepaid in the United States Mail at Reno, Nevada, following ordinary business practices

Erik Peterson, Esq.  
U.S. Dept. of Justice  
Wildlife & Marine Resources Section  
Ben Franklin Station  
P.O. Box 7369  
Washington, D.C. 20044

\_\_\_\_\_ Overnight or hand delivery to:

Erik Peterson, Esq.  
U.S. Dept. of Justice  
Wildlife & Marine Resources Section  
601 D Street, N.W., Room 3909  
Washington, D.C. 20004

\_\_\_\_\_ Personal delivery to:

Office of the U.S. Attorney  
100 W. Liberty St., Suite 600  
Reno, NV 89501

\_\_\_\_\_ Facsimile to:

Erik Peterson, Esq. 202 305 0275

DATED this 12<sup>th</sup> day of July 2010

/S/

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G.M. Cowan